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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 423

JOHN D. GLYNN,

Petitioner,

vs.

MARJORIE DOCTORMAN DUBIN, aka. MARJORIE DOCTORMAN and DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

Reply Brief of Petitioner to Respondents' Brief in opposition to Petition for a Writ of Certiorari to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

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Failure to Conform to Rules.

Petitioner points out that Respondent, without exception, has failed to comply with Rule 40(h)2 in that while reference is made many times to alleged evidence there is no page citation of record given either generally or specifically on any occasion which creates an impression of lack of good faith in view of numerous misstatements of facts which are made.

Questions Presented.

Point III of Respondents' brief incorrectly attempts to commingle various arguments and facts cited by Petitioner in his Petition for Writ of Certiorari in an attempt to claim that Petitioner asserts that mere error in construction or application of state laws, without more, raises reviewable constitutional questions. This is not Petitioner's contention but rather that the opinion of the *Utah Supreme Court* (not the District Court of the State of Utah which is attempted to be claimed by Respondents) resulted in denying Petitioner of due process of law *for the first time in the proceeding* irrespective of whether the District Court of the State of Utah was in error. See Petitioner's argument under his claim that there is a reviewable federal question.

Statement.

It should be made clear that there is only one respondent involved in this matter and that is Marjorie Doctorman Dubin, aka Marjorie Doctorman, not several respondents as indicated by opposing council.

As has been the custom throughout the history of this case respondent's council has chosen to assert certain facts as being true, admitted or acknowledged when in truth and in fact such is not the case. The following facts are not true or are not supported by any evidence:

1. On page 2 of Respondents' Brief in Opposition it is stated that the down payment on the house allegedly in excess of $10,500.00 was made out of funds accumulated by Marjorie Doctorman prior to her marriage to Dr. Martin F. Dubin. See Testimony of your Petitioner T.R. p. 59 and p. 18 of Brief of Plaintiff—Appellant before Utah Supreme Court wherein is set forth

four inconsistent allegations made by said Respondent in her verified pleadings. Said defendant put on *no* evidence at the trial of the instant action.

2. The third line from the bottom of page 2 of said Respondents' Brief in Opposition states that she prayed for the property in dispute "under claim of right." See p. 19 of Brief of Plaintiff—Appellant before the Utah Supreme Court wherein it is pointed out she did not in either divorce action (or the separate maintenance action) claim that she owned all the property or had a presently existing right to the property or that the original joint tenancy deed was void. Rather she merely sought to invoke the court's discretion.

3. With reference to the promissory note executed by your Petitioner dated December 7, 1959, and mentioned on page 3 of said Respondents Brief in Opposition it should be noted that no mention is made of the fact that said promissory note was notarized on said date. No mention is also made that it was undisputed that there were payments made on said note.

4. Page 3 of said Respondent's Brief in Opposition states that Case No. 119467 was dismissed on the Court's motion which is inconsistent with the Opinion of the Utah Supreme Court (Appendix B, p. 8) which states that the action was dismissed upon motion of defendant. (Martin F. Dubin).

5. Paragraph 1 of page 4 of said Respondents' Brief in Opposition states that a lis pendens was recorded at 1:45 P.M. on December 8, 1959 as to Case No. 123578. In connection with this statement see pages 16 and 17 of Brief of Plaintiff-Appellant before the Utah Supreme Court wherein it is pointed out that plaintiff stipulated to the admission of the lis pendens document but not to

its recording time since it appeared to be altered. *No evidence* was put on by the defendant to verify the recording time.

6. Paragraph 2 of page 4 of said Respondents' Brief in Opposition contains three *completely false* statements of fact. At no time did your Petitioner admit that he knew that the down payment for the property was made by said Respondent from her separate estate prior to her marriage to Martin F. Dubin. Your Petitioner admitted that in *one* of said Respondent's pleadings she *claimed* to have made the down payment *prior to* the marriage. (See J.P. pps 27 and 28). Likewise, at no time did your Petitioner admit that payments were made from the separate funds of said Respondent. (See T.P. p. 26). Further, at no time did your Petitioner state that he knew that the instant Respondent claimed a "right" to all of the property. Your petitioners testimony dealt with his knowledge as to what said respondent *claimed* were the *circumstances* surrounding the creation of the joint tenancy (See pps. 19 and 20 Brief of Plaintiff—Appellant before Supreme Court of the State of Utah).

7. Paragraph 3 of page 4 of Respondents Brief in Opposition states that your Petitioner knew (of the alleged *facts* stated in paragraph 2) prior to the execution and delivery of the deeds to him. Petitioner fails to comprehend how he can be charged with knowledge of the pleadings in Case No. 123578 on December 7, 1959 when the pleadings in such case were not prepared and filed until the next day December 8, 1959! (See p. 11, Brief of Plaintiff—Appellant, Utah Supreme Court).

Argument.

I. Petitioner both properly and timely raised the federal question of violation of due process. The federal

question was first raised on Petition for Rehearing. This was the *first time* Petitioner could raise the constitutional issue since it was not brought out until the opinion of the Utah Supreme Court was rendered, Respondent in her Brief in Opposition states that the Utah Supreme Court denied the petition for rehearing "summarily without passing on the questions raised therein." (p. 5) Nothing could be farther from the truth! (See Appendix C, p. 12, copy of letter relating to the constitutional issue from your Petitioner dated May 9, 1962 which was circulated to each Utah Supreme Court Justice prior to decision on the Petition for Rehearing.) Importantly, the denial of the Petition for Rehearing states *"On consideration* of the Petition for Rehearing heretofore filed herein, *and the arguments of counsel* thereupon had, it is ordered that a Rehearing be, and the same is denied. Issued May 15, 1962." (emphasis supplied) cases cited by Respondent are not in point and the analogous cases cited on page 20 of Petitioners' Petition for Writ of Certiorari are controlling.

II. Petitioner was denied due process of law by failure to be served either personally or constructively in *Dubin v. Dubin* Case No. 123578. Strangely, Respondent *now claims* that the default divorce action of *Dubin v. Dubin* left open the matter of your Petitioner's rights in the subject property. This position is contrary to explicit language of the Utah Supreme Court where it is said in part that Petitioner "could only take the property subject to whatever disposition the court (in Dubin v. Dubin) would make of it" (Appendix B, p. 10) Significantly, Respondent in her Brief of Defendant—Respondent filed with the Utah Supreme Court states in part (p. 17) ".....; and the significant principle of res judicata of the claims of appellant as settled in the second divorce action are compelling of no other con-

clusion than that of sustaining the trial court". In the light of this statement how can Respondent now claim that she and the court did not rely on the principle of res judicata even though your Petitioner was not named as a party to said action, served personally or constructively with process or was his record interest in the subject property disclosed in the pleadings in said action or at the time of the default divorce hearing even though Respondent and her two counsel knew of your Petitioner's interest of record both before the pleadings were prepared and at the time of trial?

On page 6 of Respondents' Brief in Opposition it is alleged that in a partition action your Petitioner had the burden of proving that the conveyance to him was not fraudulent. This theory is contrary to the laws of all the states since honesty and good faith are presumed and in such event Respondent had the duty to prove *all* the essential elements of a fraudulent conveyance. Even though she did not do this in the trial court the Utah Supreme Court nevertheless (without discussing numerous elements missing in a fraudulent conveyance defense or being its opinion thereon) awarded her judgment by depriving your Petitioner of due process of law.

On page 6 of Respondents' Brief in Opposition Respondent states that your Petitioner "admitted to knowledge of everything which defendant contended." This is not at all accurate. Petitioner readily admitted he knew of all of the pleadings in both actions but it cannot be said that he *knew* (as a fact) of everything Respondent *contended*. Respondent only knew what she claimed even though in some respects this was uncertain because of conflicting pleading filed by her relating to the same subject matter.

It is hard for Petitioner to comprehend how the court's jurisdiction could continue in any event as to the judgment pending on December 7, 1959 and dismissed in December 8, 1959. (Without admitting that continuing jurisdiction would be fatal). The opinion of the Utah Supreme Court states that the original action for separate maintenance placed the property "within the jurisdiction of the court and submitted to it for adjudication," and that "... Dr. Dubin could not make any conveyance thereof except subject to adjudication by the court." As set forth starting at page 29 of Petitioners' Petition for Writ of Certiorari such position is contrary to Utah and other state case authority and to the Utah *lis pendens* statute and that section of the Utah Code enabling a restraining order to be obtained in a separate maintenance action. It should again be noted that nowhere in the opinion of the Utah Supreme Court is there any statement or indication that the conveyances made by Dr. Dubin were fraudulent under Utah law. Since Respondent admitted that Petitioner stated a cause of action for partition and all elements were proved or stipulated to how were Petitioners' rights lost? In only one way—by a denial of due process of law. Cases squarely in point are found in Petitioners' Petition at pps. 26, 27, and 28.

III. Petitioner claims that there is a federal right reviewable. Such right is the right not to be deprived of property without due process of law. Petitioner does not here contend that he was denied due process of law as a result of an unjust or erroneous decision or interpretation of a state statute. Rather, Petitioner contends that one, if not many state statutes, were not followed and as a result what was done, exclusive of state law, violated your Petitioner's constitutional rights.

Conclusion.

For the reasons stated here and in more detail on your Petitioner's Petition for Writ of Certiorari Petitioner believes the Writ should be granted and opinion reversed without a reward since Respondent stated in open court through her counsel that she was satisfied with her evidence (T.R. p. 66).

Respectfully submitted,

JOHN D. GLYNN

Appearing in Pro. Se.